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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 15/2018 concerning Ramón Nsé Esono Ebalé (Equatorial Guinea)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. Its mandate was extended and clarified in resolution 1997/50 of the Commission. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/36/38), on 8 December 2017 the Working Group transmitted to the Government of Equatorial Guinea a communication concerning Ramón Nsé Esono Ebalé. The Government has not replied to the communication.

3. The State has been a party to the International Covenant on Civil and Political Rights since 25 September 1987.

The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation,

disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Mr. Ramón Nsé Esono Ebalé, a citizen of Equatorial Guinea, has lived since 2011 in Asunción, Paraguay.

5. According to the source, Mr. Ebalé is a cartoonist, blogger and human rights activist. For several years, he has written works criticizing and caricaturing the presidential regime in Equatorial Guinea. His blog, Las locuras de Jamón y Queso, which is a criticism of the President and his Government, has reportedly been blocked by the Government since 2014. He is also the author of a comic strip called La Pesadilla de Obi, a satirical narrative against the Government, depicting a dream in which the President of Equatorial Guinea wakes up one day as an ordinary citizen and has to face the reality of his country.

6. Mr. Ebalé has received numerous awards for his political cartoons, for instance in France, Côte d'Ivoire and Italy. He has worked with many organizations, including the African Union and UNICEF, on topics related to dictatorship and corruption.

Background

7. In 2011, as a result of threats in the media and from supporters of the Government, Mr. Ebalé obtained a diplomatic passport from the Spanish Ministry of Foreign Affairs, thanks to his wife's position at the time as the Director of the Cultural Centre in Malabo, Equatorial Guinea (and later in Asunción, Paraguay). He then moved to Paraguay and settled there.

8. In 2017, the Minister for Foreign Affairs of Spain reportedly withdrew the passports of cultural directors. Thus, and in the absence of cooperation on the part of the consular authorities of Equatorial Guinea in Spain, Mr. Ebalé was forced to return to Malabo on 29 August 2017 to renew his passport.

Arrest and detention

9. According to the source, on 16 September 2017, at around 7 p.m., Mr. Ebalé and two friends with Spanish citizenship were arrested outside a restaurant in Malabo by members of the national security service in civilian clothing. The three individuals were handcuffed and their cell phones confiscated. The source alleges that they were not informed of the reasons for their arrest.

10. The source then explains that Mr. Ebalé was reportedly questioned about his drawings relating to the President. It was explained to a close colleague of Mr. Ebalé, a lawyer of Equatorial Guinea and the Executive Director of EG Justice, that he would remain in detention while a statement would be drawn up on his work and political affiliations. It was also explained to him that the work of Mr. Ebalé was considered defamatory.

11. According to the source, the two Spanish citizens were released the same day. They visited Mr. Ebalé on 17 September 2017. His family visited him as well, on 18 September 2017.

12. On 20 September 2017, Mr. Ebalé was reportedly brought before a judge. At the hearing, the source alleges that the judge was presented with police allegations according to which Mr. Ebalé was suspected of money-laundering and forgery. The judge reportedly then ordered that Mr. Ebalé should be held in pretrial detention so that he could investigate the allegations. The source alleges that the judge had received instructions from the President of Equatorial Guinea to order the pretrial detention.

13. Thus, the source claims that Mr. Ebalé's pretrial detention was not justified by the charges of money-laundering and forgery, but rather because he had criticized the Government and, in his drawings and blog, had described it as a dictatorial "kleptocracy".

Mr. Ebalé was kept in pretrial detention for 75 days. During this period, he had no means to challenge his detention before the national courts.

14. According to the source, he was not formally charged at the hearing. Neither Mr. Ebalé nor his lawyers have since been informed of the charges against him.

15. On 30 September 2017, Mr. Ebalé's lawyers reportedly met the judge in Mr. Ebalé's absence to request that prosecution witnesses should be interviewed by Mr. Ebalé and his counsel. The police reportedly refused to produce witnesses and the judge issued no decision on that request.

16. According to the source, on 20 November 2017, one of Mr. Ebalé's lawyers submitted an application for bail. The judge reportedly has not responded to this application either.

17. It is also alleged that Mr. Ebalé had limited access to his lawyers and that his lawyers from Equatorial Guinea were only able to see him during the hearing of 20 September 2017. Furthermore, his lawyers reportedly received only a copy of the judge's order for the pretrial detention of Mr. Ebalé.

18. It was also reported by the source that the detention took place in a climate that has been conducive to recurrent attacks against freedom of expression since 2015. These include reported cases of arbitrary arrest and detention, such as cases in which human rights defenders were arrested and detained for 10 days in April 2017 without being formally charged. Thereafter, the Government ordered that their activities should be formally suspended. Other cases of arrest and detention without charge in 2015 and 2016, following the distribution of leaflets opposing the regime, were also reported by the source.

19. Lastly, it is reported that under the Constitution, the President is the First Magistrate of the Nation; this apparently violates the basic principle of separation of powers, a guarantee of the independence of the judicial system.

Deprivation of liberty under category I

20. The source states that the arrest and detention have no legal grounds. No information was provided on the claims made. Furthermore, the police questioning related to Mr. Ebalé's drawings and statements, which were viewed as critical of the regime and defamatory, while the court hearing of 20 September 2017 referred to charges of money-laundering and forgery.

Arbitrary detention under category II

21. According to the source, Mr. Ebalé's arrest and detention were motivated by the intention to suppress his free speech, as he produces lampooning cartoons and a blog which are critical of the regime in Equatorial Guinea and a satirical narrative condemning the regime. The arrest and detention were therefore a violation of articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (the "Covenant"). Moreover, the acts as reported are, according to the source, part of a recurrent system of repression of freedom of expression.

Deprivation of liberty under category III

22. In the summary of the case, the source describes a number of elements that would lead to violations of the right to a fair trial and more generally of the rights of the defence. Thus, the source states that Mr. Ebalé was arrested without an arrest warrant, that he was not given access to information to be used against him, that he was not formally charged and that the judge remained silent faced with requests for additional investigative procedures and for his release on bail. All of the foregoing constitutes a violation of article 14 of the Covenant.

Deprivation of liberty under category V

23. Lastly, according to the source, Mr. Ebalé's detention is based on discrimination stemming from a political opinion, as Mr. Ebalé opposes the current regime. Therefore, Mr. Ebalé's detention would also fall under category V.

Government reply

24. On 8 December 2017, a communication relating to the allegations set out above was sent to the Government of Equatorial Guinea. The Working Group, in accordance with its methods of work, set 7 February 2018 as the time limit for its response. The Working Group notes that it did not receive a response from the Government to the communication nor a request for an extension of the time limit.

Recent developments

25. The Working Group was informed by the source that Mr. Ebalé was released on 7 March 2018 and that all charges against him have been dropped.

Discussion

26. Following Mr. Ebalé's release on 7 March 2018, the Working Group has the option of filing the case or rendering an opinion as to the arbitrariness of the detention, in conformity with paragraph 17 (a) of its methods of work. In this case, in the light of the circumstances, and despite the lack of response from the Government, the Working Group has decided to issue this opinion, in accordance with paragraph 15 of its methods of work.

27. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

28. By way of introduction, it should be noted that this is the first case before the Working Group concerning Equatorial Guinea. However, the Working Group visited the country in 2007 (A/HRC/7/4/Add.3) and on that occasion had expressed regret at the lack of independence of the judiciary. It is a matter of public record that political opponents and human rights defenders are especially subjected to repression, with the justice system exploited to support those in power.[1] This strengthens the reliability and credibility of the source in the present case. Mr. Ebalé's case was extensively covered in the press, and two urgent appeals were sent to the Government (UA GNQ 1/2017 of 2 October 2017 and UA GNQ 1/2018 of 22 February 2018). The Working Group regrets that these urgent appeals have gone unanswered. In the present case, the Government also chose not to refute the allegations made by the source. The Working Group considers that these allegations are credible in view of these various elements and therefore considers them to be substantiated.

29. It has thus been established that Mr. Ebalé was arrested on 16 September 2017 without being informed of the reasons for his arrest and without the presentation of an arrest warrant, in violation of article 9 of the Covenant.[2] This violation renders the arrest and subsequent detention arbitrary under category I.

30. It has also been established that Mr. Ebalé, on the day of his arrest, was reportedly questioned not about the offences of counterfeiting and money-laundering of which he was later accused during his appearance before the judge (para. 13, above), but about his satirical drawings of the President. His activities as a human rights activist were considered

[1] See, inter alia, European External Action Service, Statement by the Spokesperson on the human rights situation in the Republic of Equatorial Guinea, 2 February 2018; and amnesty.org, Equatorial Guinea, 2017–2018.

[2] Also in violation of article 13 (m) of the Constitution of Equatorial Guinea and article 520-2 of the Code of Criminal Procedure of Equatorial Guinea; see opinion No. 34/2016, para. 38.

defamatory by the authorities in charge of his questioning. The Working Group emphasizes that the past actions of the Government against Mr. Ebalé, as reported by the source (paras. 6 and 8, above), reinforce the perception that Mr. Ebalé was arrested and detained only because he expressed his political opinions through his artistic work. That freedom of expression is guaranteed under article 19 of the Covenant, article 19 of the Universal Declaration of Human Rights and article 9 of the African Charter on Human and Peoples' Rights. Such freedom cannot be limited unless this is done under the conditions set out in article 19 (3) of the Covenant. In this respect, the Human Rights Committee has invoked three criteria for legitimate grounds to limit freedom of expression: (a) the restriction must be expressly provided by law; (b) it must serve one of the legitimate objectives set out in paragraph 3 of the article; and (c) it must be proportionate and necessary to the achievement of that objective.[3] In the present case, the Working Group notes that, apart from the fact that such limitations would in its opinion not be relevant to a work lampooning a public figure, no reference has been made to any such limitations. In these circumstances, the Working Group considers that in the absence of any justification in accordance with this provision, the arrest and detention of Mr. Ebalé are arbitrary under category II. In these conditions, no trial of Mr. Ebalé can be justified, and the Working Group will therefore consider the arguments concerning the right to a fair trial only as an additional element, possibly to conclude that this was an aggravating circumstance of the arbitrary nature of the detention.

31. First, the Working Group notes that article 86 of the Constitution of Equatorial Guinea provides that "the head of State shall be the first magistrate of the nation", guaranteeing "the independence of the judiciary". In paragraph 12 of the above-mentioned report (A/HRC/7/4/Add.3), the Working Group noted this constitutional provision and the President's power to appoint judges, considering that it pointed to a lack of independence of the judiciary (paras. 59 and 60).

32. The Working Group recalls general comment No. 32 (2007) of the Human Rights Committee, which sets out that "the requirement of competence, independence and impartiality of a tribunal in the sense of article 14 (1) is an absolute right that is not subject to any exception". It also indicates that "States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the Constitution" and that "a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal".[4] The Working Group thus believes that the domestic provisions governing the relationship between the judiciary and the executive branch do not satisfy the requirements of the principle of independence and impartiality of the judiciary.

33. The Working Group further notes that the Human Rights Committee has clarified that a reasonable delay for bringing an arrested person before a judge should be interpreted as not exceeding 48 hours, save in exceptional circumstances,[5] and that, for persons pending trial, detention should be the exception and not the rule.[6] The Working Group also notes that the Committee has specified that "the right to communicate with counsel requires that the accused is granted prompt access to counsel",[7] and that "States parties should permit and facilitate access to counsel for detainees in criminal cases from the outset of

[3] CCPR/C/GC/34, para. 22.

[4] See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 19; as well as communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.

[5] Article 520 (1) of the Code of Criminal Procedure sets the time limit for presentation before a judge at 72 hours; See general comment No. 35 (2014) of the Human Rights Committee on liberty and security of person, para. 33.

[6] Ibid., para. 38.

[7] See general comment No. 32 (2007) of the Human Rights Committee on the right to equality before courts and tribunals and to a fair trial, para. 34.

their detention",[8] but also that the right to equality before the courts implies equality of arms as well as the absence of discrimination for the parties to the proceedings.[9]

34. The Working Group therefore considers that the allegations of the source reveal a number of other violations of the right to a fair trial; specifically, the absence of arrest and search warrants (paras. 10 and 29, above); failure to bring the detainee before a judge without undue delay in order to give him the opportunity to challenge the legality of his detention (para. 13, above); violation of the right to liberty pending trial (para. 17, above); violation of the right to legal representation (para. 18, above); violation of the right to be tried by a competent and impartial tribunal (paras. 20 and 32, above); and failure to guarantee equality of arms for the parties to the proceedings (paras. 15 to 18, above).

35. In these circumstances, the Working Group considers that the detention of Mr. Ebalé violates articles 9 and 10 of the Universal Declaration of Human Rights; articles 9 and 14 of the Covenant; articles 6 and 7 of the African Charter on Human and Peoples' Rights; rules 61 and 119 of the Nelson Mandela Rules; and principles 2, 4, 10, 11, 18, 32, 36, 37, 38 and 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Working Group finds that the violations are of such gravity as to give the deprivation of liberty an arbitrary character in accordance with category III.

36. The Working Group is convinced that the arrest and detention were directed against Mr. Ebalé for being an artist who opposes the regime, internationally recognized by his peers for his satirical caricatures.[10] In this capacity, he also has the status of a defender of freedom of expression and political opinion in the social context of Equatorial Guinea. The Group has already concluded that being a human rights activist is a status protected under article 26 of the Covenant.[11] The Working Group recalls that international law requires States to take all necessary measures to ensure the protection by the competent authorities of everyone against threats, pressure and arbitrary actions taken against them on the basis of the right to promote human rights.[12] Consequently, the Working Group concludes that Mr. Ebalé has been discriminated against because of his political views and his criticism of the Government and of the ruling political party, in violation of article 26 of the Covenant and article 8 of the Universal Declaration of Human Rights. His arrest and detention are thus arbitrary under category V.

37. Lastly, because of the types of human rights violations that have been found in the present case, the Working Group considers that the allegations it has received should be sent on to the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

Disposition

38. Although Mr. Ebalé was released on 7 March 2018, the Working Group, in accordance with paragraph 17 (a) of its methods of work, reserves the right to render an opinion as to whether or not the deprivation of liberty was arbitrary, notwithstanding the release. In the light of the foregoing, the Working Group renders the following opinion: The deprivation of liberty of Mr. Ebalé, being in contravention of articles 8, 9, 10 and 19 of the Universal Declaration of Human Rights and of articles 9, 14, 19 and 26 of the International Covenant on Civil and Political Rights, was arbitrary and falls within categories I, II, III and V.

39. The Working Group requests the Government of Equatorial Guinea to take the steps necessary to remedy the situation of Mr. Ebalé without delay and bring it into conformity

[8] See general comment No. 35 (2014) of the Human Rights Committee on article 9: liberty and security of person, para. 35.

[9] Ibid., para. 8.

[10] Mr. Ebalé's work has won various awards (see para. 7, above).

[11] See opinion No. 48/2017.

[12] Article 12 of the Declaration on Human Rights Defenders.

with the relevant international norms, including those set out in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, with the inclusion of a guarantee of non-repetition.

40. Taking into account all the circumstances of the case, the Working Group considers that the adequate remedy would be to accord to Mr. Ebalé an enforceable right to full reparations, in accordance with international law.

41. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Ebalé and to take appropriate measures against those responsible for the violation of his rights.

42. In accordance with paragraph 33 (a) of its methods of work, the Working Group is sending the allegations that it has received to the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

Follow-up procedure

43. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether compensation or other reparations have been made to Mr. Ebalé;

(b) Whether an investigation has been conducted into the violation of Mr. Ebalé's rights and, if so, the outcome of the investigation;

(c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Equatorial Guinea with its international obligations in line with the present opinion, taking into account the need for a guarantee of non-repetition;

(d) Whether any other action has been taken to implement the present opinion.

44. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

45. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

46. The Government should disseminate through all available means the present opinion among all stakeholders.

47. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[13]

[Adopted on 20 April 2018]

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[13] See Human Rights Council resolution 24/7, paras. 3 and 7.